



## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90492]

### Statement on Central Counterparties Authorized under the European Markets

### Infrastructure Regulation Seeking to Register as a Clearing Agency or to Request

### Exemptions from Certain Requirements under the Securities Exchange Act of 1934

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Policy statement; guidance.

**SUMMARY:** The Securities and Exchange Commission (“SEC”) is issuing a policy statement and guidance regarding future applications from a central counterparty (“CCP”) authorized under the European Market Infrastructure Regulation (“EMIR”) and based in the European Union (an “EU CCP”) that is seeking to register as a clearing agency with the SEC under the Securities Exchange Act of 1934 (“Exchange Act”) and future requests by EU CCPs for exemptions from certain SEC requirements.

**DATES:** The Commission’s policy statement is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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**SUPPLEMENTARY INFORMATION:** The SEC regulates as clearing agencies two EU CCPs authorized under EMIR that provide CCP services for security-based swaps.<sup>1</sup> Where an

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<sup>1</sup> The Commission has based this statement, in part, on its experience regulating EU CCPs for security-based swaps, and therefore this release primarily discusses the Commission’s processes for registration as a clearing agency and for requesting exemptions with respect to such CCPs. However, the Commission notes that the policy and guidance set forth in this statement,

EU CCP has been authorized under EMIR, it is subject to requirements that are generally consistent with the same international standards for CCPs as are the SEC's requirements for CCPs. Based on these factors, the SEC is issuing this policy statement and guidance to describe the processes for EU CCPs seeking to register as clearing agencies or to request exemptions from SEC requirements. To provide transparency into SEC processes and to highlight efficient ways that EU CCPs can comply with SEC rules, this policy statement and guidance identifies the information that an EU CCP can provide in its registration application and provides a summary of the factors that the SEC will consider, as applicable, with respect to future requests for exemptions. Specifically, with respect to the registration process, EU CCPs can use preexisting materials, including self-assessments, in their applications to demonstrate compliance with EMIR and consistency with SEC requirements for CCPs. Such materials and self-assessments could facilitate both the EU CCP's efficient preparation of the application and the SEC's review of applications for registration. With respect to requests for exemptions, the SEC identifies below specific factors that it will consider if relevant to a particular future request for an exemption by an EU CCP. As an example of one such factor, an EU CCP may request an exemption because it has determined that the application of SEC requirements would impose unnecessary, duplicative, or inconsistent requirements in light of EMIR requirements to which it is subject. Issuing this policy statement and guidance is relevant to the SEC's ongoing dialogue with the European Commission ("EC") regarding the EC's consideration of whether to find the SEC's regulatory framework for CCPs equivalent to EMIR.

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by its terms and as set forth below, also applies to an EU CCP that clears securities other than security-based swaps.

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## **I. Introduction**

The SEC regulates centralized clearance and settlement systems for securities, including those provided by CCPs and central securities depositories (“CSDs”). As part of the Securities Acts Amendments of 1975 (“1975 Amendments”), Congress directed the SEC to facilitate the establishment of a national system for the prompt and accurate clearance and settlement of securities transactions.<sup>2</sup> Since the enactment of the 1975 Amendments, the SEC has given regular consideration to how non-U.S. clearing agencies fit within the SEC’s regulatory framework under the Exchange Act.<sup>3</sup> The SEC also acted to facilitate the central clearing of credit default swaps by permitting certain entities that performed CCP services to clear and settle credit default swaps on a temporary, conditional basis.<sup>4</sup>

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<sup>2</sup> See 15 U.S.C. 78q-1(a)(2); see also Report of the Senate Committee on Banking, Housing & Urban Affairs, S. Rep. No. 94-75, at 4 (1975) (stating that “[t]he Committee believes the banking and security industries must move quickly toward the establishment of a fully integrated national system for the prompt and accurate processing and settlement of securities transactions”).

<sup>3</sup> See Release No. 34-11904 (Dec. 5, 1975), 40 FR 57872 (Dec. 12, 1975) (considering requests for exemptions from non-U.S. clearing agencies).

<sup>4</sup> The SEC authorized five entities to clear credit default swaps, three of which were based in the EU. See Exchange Act Release Nos. 60372 (July 23, 2009), 74 FR 37748 (July 29, 2009), 61973 (Apr. 23, 2010), 75 FR 22656 (Apr. 29, 2010) and 63389 (Nov. 29, 2010), 75 FR 75520

In 2010, Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) amended the Exchange Act to provide for the comprehensive regulation of security-based swaps by the SEC.<sup>5</sup> In 2012, the EU adopted the EMIR framework to accomplish many of the same objectives in the EU. The oversight and regulation of security-based swap activity that is centrally cleared by both the SEC and under EMIR occurs through the registration and supervision of clearing agencies, among other things. Under its regulatory framework for clearing agencies, the SEC supervises clearing agencies that are subject to EU regulatory frameworks,<sup>6</sup> including EMIR.

With regard to EU CCPs currently registered with the SEC as clearing agencies,<sup>7</sup> the SEC has applied requirements commensurate and appropriate to the risks posed by the clearing

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(Dec. 3, 2010) (CDS clearing by ICE Clear Europe Limited (“ICEEU”); 60373 (July 23, 2009), 74 FR 37740 (July 29, 2009), 61975 (Apr. 23, 2010), 75 FR 22641 (Apr. 29, 2010) and 63390 (Nov. 29, 2010), 75 FR 75518 (Dec. 3, 2010) (CDS clearing by Eurex Clearing AG); 59578 (Mar. 13, 2009), 74 FR 11781 (Mar. 19, 2009), 61164 (Dec. 14, 2009), 74 FR 67258 (Dec. 18, 2009), 61803 (Mar. 30, 2010), 75 FR 17181 (Apr. 5, 2010) and 63388 (Nov. 29, 2010), 75 FR 75522 (Dec. 3, 2010) (CDS clearing by Chicago Mercantile Exchange, Inc.); 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009), 61119 (Dec. 4, 2009), 74 FR 65554 (Dec. 10, 2009), 61662 (Mar. 5, 2010), 75 FR 11589 (Mar. 11, 2010) and 63387 (Nov. 29, 2010), 75 FR 75502 (Dec. 3, 2010) (CDS clearing by ICE Trust US LLC); 59164 (Dec. 24, 2008), 74 FR 139 (Jan. 2, 2009) (temporary CDS clearing by LIFFE A&M and LCH.Clearnet Ltd.).

<sup>5</sup> See Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>6</sup> In addition to EU CCPs discussed in this document, the SEC regulates clearing agencies that provide CSD services. See Release Nos. 34-38328 (Feb. 24, 1997), 62 FR 9225 (Feb. 28, 1997) (order approving application for exemption from clearing agency registration for Cedel Bank, now Clearstream); 34-39643 (Feb. 11, 1998), 63 FR 8232 (Feb. 18, 1998) (order approving application for exemption from clearing agency registration by Morgan Guaranty Trust Company of New York, Brussels Office, as operator of the Euroclear System, now Euroclear Bank).

<sup>7</sup> As discussed in more detail in Part II.C, the SEC granted ICEEU an exemption from clearing agency registration on July 23, 2009 to clear and settle credit default swaps on a temporary, conditional basis. ICEEU was subsequently deemed a clearing agency registered with the SEC on July 16, 2011. On December 16, 2016, the Commission registered Banque Centrale de Compensation, which conducts business under the name LCH SA (“LCH SA”) as a clearing agency, so that it may provide CCP services for security-based swaps to U.S. persons and LCH SA.

agency functions and activities. The SEC believes that its supervisory approach to these EU CCPs has benefited from the SEC’s familiarity with EMIR, including through the rule filing process for self-regulatory organizations (“SROs”),<sup>8</sup> and from ongoing communication and coordination between SEC staff and staff at the relevant national competent authorities (“NCAs”) for EU CCPs. The SEC also recognizes that both EMIR and the SEC’s regulatory frameworks are designed to be generally consistent with the Principles for Financial Market Infrastructures (“PFMI”),<sup>9</sup> which are the relevant international standards for CCPs.<sup>10</sup>

Based on these factors, the SEC is issuing this policy statement and guidance to provide transparency into the processes for a new EU CCP applicant to (i) register with the SEC as a clearing agency to provide CCP services, and (ii) request exemptions from certain SEC requirements under the Exchange Act using preexisting materials in their applications that demonstrate compliance with EMIR and also consistency with SEC requirements for CCPs.<sup>11</sup> The SEC is also highlighting efficient ways that EU CCPs can comply with SEC rules.

Part II briefly describes EMIR and the SEC’s regulatory framework for CCPs, both of which are generally consistent with common international standards for CCPs, and summarizes the SEC’s experience with supervising or otherwise engaging with EU CCPs that the SEC has

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<sup>8</sup> An SRO must submit proposed rule changes to the SEC for review and approval pursuant to 17 CFR 240.19b-4 (“Rule 19b-4”). A stated policy, practice, or interpretation of an SRO would generally be deemed to be a proposed rule change. See 15 U.S.C. 78s(b)(1); 17 CFR 240.19b-4.

<sup>9</sup> See Committee on Payment and Settlement Systems and Technical Committee of the International Organization of Securities Commissions (“CPSS-IOSCO”), Principles for financial market infrastructures (Apr. 16, 2012), <http://www.bis.org/publ/cpss101a.pdf>. In 2014, the CPSS became the Committee on Payments and Market Infrastructures (“CPMI”).

<sup>10</sup> Title VIII of the Dodd-Frank Act directs the SEC, when prescribing risk management standards for systemically important CCPs, to take into consideration relevant international standards and existing prudential requirements. See 12 U.S.C. 5464(a)(2).

<sup>11</sup> Pursuant to the Congressional Review Act, the Office of Information and Regulatory Affairs has designated this statement as not a “major rule,” as defined by 5 U.S.C. 804(2). See 5 U.S.C. 801 et seq.

registered as clearing agencies. Part III describes and provides guidance regarding the process for seeking registration and requesting exemptions from SEC requirements. In particular, Part III.A provides guidance regarding the types of documentation that can be provided to facilitate both the efficient preparation of an application and the SEC’s review of the application. Part III.B describes and provides guidance regarding the types of exemptions the SEC has generally provided to EU CCPs in the past and identifies the factors that the SEC will consider, if relevant to a particular request for an exemption, when reviewing future requests for exemptions.

## **II. Background**

### **A. SEC Requirements for CCPs**

SEC requirements for CCPs are codified in 17 CFR 240.17Ad-22 (“Rule 17Ad-22”) and designed to ensure that CCPs operate consistent with the requirements of Section 17A of the Exchange Act, which establishes the national system for clearance and settlement of securities transactions in the United States.<sup>12</sup> As a general matter, Rule 17Ad-22 includes policies and procedures requirements designed to promote the safe and reliable operation of registered clearing agencies, and to improve efficiency, transparency, and access to registered clearing agencies.<sup>13</sup> Rule 17Ad-22(e) establishes an enhanced regulatory framework for clearing agencies that provide the services of CCPs and CSDs.<sup>14</sup> It includes requirements for policies and procedures related to, among other things, financial risk management, governance, recovery

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<sup>12</sup> See 17 CFR 240.17Ad-22; see also Clearing Agency Standards, Release No. 34-68080 (Oct. 22, 2012), 77 FR 66220, 66225–26 (Nov. 2, 2012) (“Clearing Agency Standards adopting release”).

<sup>13</sup> See Clearing Agency Standards adopting release, supra note 13, at 66224–25.

<sup>14</sup> See 17 C.F.R. 240.17Ad-22(e); Release No. 34-78961 (Sept. 28, 2016), 81 FR 70786 (Oct. 13, 2016) (“CCA Standards adopting release”). While Rule 17Ad-22(e) originally applied to systemically important clearing agencies and clearing agencies for security-based swaps, the Commission amended the approach in 2020 so that Rule 17Ad-22(e) applies to any clearing agency that provides the services of a CCP or CSD. See Release No. 34-88616 (Apr. 9, 2020), 85 FR 28853 (May 14, 2020).

planning, operations, and general business risk.<sup>15</sup> In adopting Rule 17Ad-22(e), the SEC noted that it was consistent with the PFMI.<sup>16</sup> In addition, CCPs registered with the SEC as clearing agencies are also SROs under the Exchange Act and subject to the SRO rule filing process for proposed rule changes,<sup>17</sup> and registered clearing agencies are subject to the requirements of Regulation Systems Compliance and Integrity.<sup>18</sup>

With respect to CCPs for security-based swaps, Congress has charged the SEC with oversight of security-based swaps and the obligation to ensure that risk in the U.S. securities markets is appropriately managed, consistent with the purposes of the Exchange Act and Title VII of the Dodd-Frank Act.<sup>19</sup> Security-based swaps, and the CCPs that clear them, present unique risks to the U.S. securities markets, necessitating appropriate risk management by the CCPs and supervision by the SEC.<sup>20</sup> As it does more generally with respect to clearing agencies,

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<sup>15</sup> See CCA Standards adopting release, supra note 14.

<sup>16</sup> See CCA Standards adopting release, supra note 14, at 70789 (stating that “the PFMI is the relevant international standard for systemically important financial market infrastructures, such as [clearing agencies]. . . . Commission staff co-chaired the working group within CPSS-IOSCO that drafted both the consultative and final versions of the PFMI, and the Commission believes that the requirements applicable to clearing agencies set forth in the Exchange Act and the rules thereunder, including [Rule 17Ad-22(e)], are consistent with the standards set forth in the PFMI. Regulatory authorities around the world are in various stages of updating their regulatory regimes to adopt measures consistent with the PFMI. [Rule 17Ad-22 is] a continuation of the Commission’s active effort to foster the development of the national clearance and settlement system, consistent with the requirements of the Exchange Act, and enhance the regulation and supervision of [clearing agencies], consistent with the Clearing Supervision Act.”). Similar to the subparts of Rule 17Ad-22(e), the PFMI includes 23 principles intended to address different potential sources of risk to CCPs and CSDs, including, among other things, legal risk, financial risk management, operational risk, and governance. See supra note 9.

<sup>17</sup> See supra note 8.

<sup>18</sup> See 17 CFR 242.1000 et seq.; Release No. 34-73639 (Nov. 19, 2014), 79 FR 72251 (Dec. 5, 2014).

<sup>19</sup> See id. at 70800.

<sup>20</sup> See, e.g., id. at 70854–55 (noting that certain requirements in Rule 17Ad-22(e) are applied specifically to CCPs for security-based swaps to protect against the risks associated with the jump-to-default risk and nonlinear payoffs associated with security-based swaps).

the SEC has sought to apply requirements to such CCPs commensurate and appropriate to these risks while recognizing that each CCP has different organizational and operating structures and clears distinct products that warrant a tailored approach to governance and risk management. Accordingly, the SEC's regulatory framework for CCPs is designed to balance imposing appropriate regulatory requirements on CCPs and allowing each CCP, subject to its obligations and responsibilities as an SRO,<sup>21</sup> to implement its own policies and procedures consistent with Rule 17Ad-22.<sup>22</sup>

## **B. EMIR Requirements for CCPs**

EMIR was enacted in 2012 and, among other things, sets out requirements for the clearing of OTC derivatives through authorized CCPs.<sup>23</sup> More specifically, EMIR introduces rules to reduce the counterparty credit risk of derivatives contracts by requiring that: all standardized OTC derivatives contracts must be centrally cleared through CCPs; if a contract is not cleared by a CCP, risk mitigation techniques must be applied; and CCPs must comply with stringent prudential, organizational, and conduct of business requirements. The regulation also requires market participants to monitor and mitigate the operational risks associated with transactions in derivatives, such as fraud and human error, by, for example, using electronic

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<sup>21</sup> See supra notes 8, 17, and accompanying text (discussing the SRO rule filing process in further detail).

<sup>22</sup> See CCA Standards adopting release, supra note 14, at 70875.

<sup>23</sup> Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, as amended, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02012R0648-20200101>. The Commission notes that it would take substantially the same approach set out in this document for other jurisdictions that have adopted a regulatory framework that is substantially similar to EMIR.

means to promptly confirm the terms of OTC derivatives contracts.<sup>24</sup> Recital 90 of EMIR also notes that EMIR is designed to be generally consistent with the PFMI:

It is important to ensure international convergence of requirements for CCPs and trade repositories. This Regulation follows the existing recommendations developed by the Committee on Payment and Settlement Systems (CPSS) and International Organization of Securities Commissions (IOSCO) noting that the CPSS-IOSCO principles for financial market infrastructure, including CCPs, were established on 16 April 2012. It creates a Union framework in which CCPs can operate safely. ESMA should consider these existing standards and their future developments when drawing up or proposing to revise the regulatory technical standards as well as the guidelines and recommendations foreseen in this Regulation.

In addition, the European Securities Markets Authority (“ESMA”) issued guidance confirming that EMIR and the relevant Regulatory Technical Standards are “intended for the EU regulatory framework for CCPs to consistently implement the PFMI, and NCAs have already been applying the PFMI in their supervision of CCPs.”<sup>25</sup>

### **C. SEC-Registered Clearing Agencies Based in the EU**

The SEC regulates two registered clearing agencies based in the EU that provide CCP services for security-based swaps pursuant to EU regulatory requirements, and the SEC has sought to avoid the application of unnecessary, duplicative, or inconsistent regulatory requirements with respect to these clearing agencies. ICEEU is based in the United Kingdom and was an authorized CCP under EMIR until the UK left the EU on January 31, 2020. The Commission granted ICEEU an exemption from clearing agency registration on July 23, 2009, to

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<sup>24</sup> See EC, “Derivatives/EMIR,” [https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-markets/post-trade-services/derivatives-emir\\_en#eu-rules-on-derivatives-contracts](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-markets/post-trade-services/derivatives-emir_en#eu-rules-on-derivatives-contracts).

<sup>25</sup> See ESMA, Guidelines and Recommendations regarding the implementation of the CPSS-IOSCO Principles for Financial Market Infrastructures in respect of Central Counterparties (Apr. 9, 2014), [https://www.esma.europa.eu/sites/default/files/library/2015/11/2014-1133\\_en.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/2014-1133_en.pdf).

clear and settle credit default swaps on a temporary, conditional basis.<sup>26</sup> Congress deemed ICEEU a clearing agency registered with the SEC on July 16, 2011, so that ICEEU could provide CCP services for security-based swaps.<sup>27</sup> LCH SA is based in France and is an authorized CCP under EMIR. LCH SA applied for registration as a clearing agency to provide CCP services for security-based swaps to U.S. persons in 2016, and the SEC registered LCH SA on December 16, 2016.<sup>28</sup>

The SEC's regulatory approach to ICEEU and LCH SA avoids the application of unnecessary, duplicative, or inconsistent regulatory requirements in several ways. First, SEC requirements for clearing agencies generally, and in Rule 17Ad-22 specifically, are principles-based rather than prescriptive, enabling ICEEU and LCH SA to achieve compliance with SEC requirements, through the SRO rule filing process, in a manner that is also consistent with EMIR.<sup>29</sup> Second, the SEC requirements for CCPs, codified in Rule 17Ad-22, are generally

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<sup>26</sup> The Commission granted the exemption in connection with its efforts to facilitate the central clearing of credit default swaps prior to the enactment of the Dodd Frank Act. See Release Nos. 34-60373 (July 23, 2009), 74 FR 37740 (July 29, 2009), 61975 (Apr. 23, 2010), 75 FR 22641 (Apr. 29, 2010) and 63390 (Nov. 29, 2010), 75 FR 75518 (Dec. 3, 2010).

<sup>27</sup> Section 763(b) of the Dodd-Frank Act amended Section 17A of the Exchange Act by adding new paragraph (I), 15 U.S.C. 78q-1(I), which provides that (i) a depository institution registered with the CFTC that cleared swaps as a multilateral clearing organization prior to the date of enactment of the Dodd-Frank Act and (ii) a derivatives clearing organization registered with the CFTC that cleared swaps pursuant to an exemption from registration as a clearing agency prior to the date of enactment of the Dodd-Frank Act will be deemed registered with the Commission as a clearing agency solely for the purpose of clearing security-based swaps.

<sup>28</sup> See Release No. 34-79707 (Dec. 29, 2016), 82 FR 1398 (Jan. 5, 2017) ("LCH SA registration order").

<sup>29</sup> Both ICEEU and LCH SA are subject to Section 19(b) of the Exchange Act, which requires a registered clearing agency to submit proposed rule changes to the SEC for public comment and SEC review and approval. See supra notes 8 and 17 (further discussing the requirements of the rule filing process under Rule 19b-4).

consistent with the PFMI,<sup>30</sup> as are the requirements under the EMIR framework.<sup>31</sup> Third, as discussed further below and in Part III.B, the SEC has exempted both clearing agencies from certain SEC requirements that may be unnecessary, duplicative, or inconsistent in light of EMIR requirements to which the EU CCPs are subject.<sup>32</sup> Fourth, the SEC remains engaged in a collaborative regulatory dialogue with the NCAs for each CCP, including the Bank of England for ICEEU and the Autorité des Marchés Financiers, Autorité de Contrôle Prudentiel et de Résolution, and Banque de France for LCH SA. The following sections provide a brief overview of the SEC's experience with each clearing agency, including examples of how the SEC has used its supervisory authority to avoid imposing unnecessary, duplicative, or inconsistent requirements on each clearing agency.

## **1. ICEEU**

Pursuant to the Exchange Act and Rule 19b-4 thereunder, the SEC has published, reviewed, and approved a number of proposed rule changes submitted by ICEEU that, based on the information and representations made by ICEEU, were intended to facilitate its efforts to comply with EMIR, in addition to the Exchange Act. These proposed rule changes addressed topics including: (i) segregation and portability of customer positions and margin; (ii) risk modeling; (iii) back testing; (iv) stress testing; (v) default management; and (vi) liquidity risk management.<sup>33</sup> In a number of instances, the SEC found good cause to provide accelerated

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<sup>30</sup> See supra note 16 and accompanying text.

<sup>31</sup> See supra note 25 and accompanying text.

<sup>32</sup> See infra notes 40–42, 55–57, and accompanying text.

<sup>33</sup> See Release Nos. 34-73075 (Sept. 11, 2014), 79 FR 55848 (Sept. 17, 2014); 34-72756 (Aug. 4, 2014), 79 FR 46479 (Aug. 8, 2014); 34-72755 (Aug. 4, 2014), 79 FR 46481 (Aug. 8, 2014); 34-72754 (Aug. 4, 2014), 79 FR 46477 (Aug. 8, 2014).

approval<sup>34</sup> for proposed rule changes derived from EMIR requirements.<sup>35</sup> The SEC has also published notice of certain other immediately effective ICEEU rule filings<sup>36</sup> that were submitted in connection with other EU-based regulatory requirements for EU CCPs, including the General Data Protection Regulation,<sup>37</sup> the revised Markets in Financial Instruments Directive (“MiFID II”),<sup>38</sup> and the Markets in Financial Instruments Regulation (“MiFIR”).<sup>39</sup>

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<sup>34</sup> See 15 U.S.C. 78s(b)(2)(C)(iii).

<sup>35</sup> See, e.g., ICEEU Notice of Filing Amendment Nos. 1 and 2 and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, to Revise the ICE Clear Europe Clearing Rules Relating to the Application of Default Provisions in the Event of a Resolution Proceeding, Release No. 34-80304 (Mar. 24, 2017) <https://www.sec.gov/rules/sro/iceeu/2017/34-80304.pdf>; ICEEU Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change Relating to Amendments to the ICE Clear Europe CDS Risk Policy, Release No. 34-81680 (Sep. 22, 2017), <https://www.sec.gov/rules/sro/iceeu/2017/34-81680.pdf>; ICEEU Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Relating to Amendments to the ICE Clear Europe Clearing Rules and Procedures for Indirect Clearing, Release No. 34-82422 (Dec. 29, 2017), <https://www.sec.gov/rules/sro/iceeu/2017/34-82422.pdf>; ICEEU Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1, Relating to Intraday Margining, Release No. 34-84375 (Oct. 5, 2018), <https://www.sec.gov/rules/sro/iceeu/2018/34-84375.pdf>.

<sup>36</sup> See ICEEU Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Accounts Categories for Positions of Clearing Member Affiliates, Release No. 34-77809 (May 11, 2016), available at: <https://www.sec.gov/rules/sro/iceeu/2016/34-77809.pdf>; ICEEU Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Certain Default Management Requirements under Applicable Law, Release No. 34-78762 (Sep. 2, 2016), available at: <https://www.sec.gov/rules/sro/iceeu/2016/34-78762.pdf>.

<sup>37</sup> See, e.g., ICEEU Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Amendments to the Clearing Rules to Implement the European Union General Data Protection Regulation, Release No. 34-83311 (May 23, 2018), <https://www.sec.gov/rules/sro/iceeu/2018/34-83311.pdf>; ICEEU Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to the Clearing Rules, Release No. 34-85247 (Mar. 5, 2019), <https://www.sec.gov/rules/sro/iceeu/2019/34-85247.pdf>.

<sup>38</sup> See ICEEU Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the ICE Clear Europe Clearing Rules and Procedures, Release No. 34-86753 (Aug. 23, 2019), <https://www.sec.gov/rules/sro/iceeu/2019/34-86753.pdf>.

<sup>39</sup> See ICEEU Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Relating to Amendments to the ICE Clear Europe Clearing Rules and Procedures for Indirect Clearing, Release No. 34-82422 (Dec. 29, 2017), <https://www.sec.gov/rules/sro/iceeu/2017/34-82422.pdf>.

## 2. LCH SA

When the SEC approved LCH SA's registration as a clearing agency, LCH petitioned for, and the SEC granted, exemptions from certain requirements in the Exchange Act for aspects of LCH SA's U.S. operations, referencing the fact that LCH SA is subject to oversight by regulators in other jurisdictions.<sup>40</sup> Specifically, the SEC granted exemptions from requirements in Rule 17a-22 (concerning the filing by clearing agencies of certain supplemental material provided to participants), Rule 17Ad-22(c)(2) and (c)(2)(iii) (relating to annual audited financial statements), Section 19(b) of the Exchange Act and Rule 19b-4 thereunder (relating to SRO rule filings),<sup>41</sup> and Sections 5 and 6 of the Exchange Act (relating to registration as an exchange).<sup>42</sup> In addition, as part of its oversight of LCH SA, the SEC routinely evaluates representations made in proposed rule changes submitted by LCH SA that state as their purpose a need to comply with EMIR regulatory requirements, and the SEC has been able to approve multiple rule filings after finding that they were consistent with the Exchange Act, enabling LCH SA to achieve compliance with both the Exchange Act and EMIR.<sup>43</sup>

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<sup>40</sup> See LCH SA registration order, supra note 28, at 1398.

<sup>41</sup> See supra notes 8, 17, and 29 (further discussing the requirements of the rule filing process under Rule 19b-4 for registered clearing agencies).

<sup>42</sup> See LCH SA registration order, supra note 28, at 1414–15; see also Release No. 34-64795 (July 1, 2011), 76 FR 39927, 39934–35 (July 7, 2011) (further describing exemptions from Sections 5 and 6 of the Exchange Act for clearing agencies for security-based swaps).

<sup>43</sup> See LCH SA Order Granting Accelerated Approval of a Proposed Rule Change Relating to the Implementation of the Markets in Financial Instruments Regulation, Release No. 34-82421 (Dec. 29, 2017), <https://www.sec.gov/rules/sro/lchsa/2017/34-82421.pdf>; LCH SA Order Granting Approval on an Accelerated Basis of Proposed Rule Change Relating to Self-Referencing Transactions, Release No. 34-82883 (Mar. 15, 2018), <https://www.sec.gov/rules/sro/lchsa/2018/34-82883.pdf>; see also LCH SA Order Granting Accelerated Approval of a Proposed Rule Change Relating to the Implementation of the Markets in Financial Instruments Regulation, Release No. 34-82421 (Dec. 29, 2017), <https://www.sec.gov/rules/sro/lchsa/2017/34-82421.pdf>.

### **III. SEC Process for Review of Applications for Registration as a Clearing Agency and Requests for Exemptions by EU CCPs**

For the reasons discussed above, the SEC is describing, and providing transparency into, its processes to assist EU CCPs seeking registration or requesting exemptions. The guidance includes information that an EU CCP can provide in its application and a summary of the factors that the SEC will consider, if applicable to a particular request, with respect to future exemption requests.

#### **A. Applications for Registration as a Clearing Agency**

To register as a clearing agency, an EU CCP must submit an application for registration on Form CA-1 in accordance with Section 17A of the Exchange Act and Rule 17Ab2-1 thereunder.<sup>44</sup> Form CA-1 requires an applicant to complete the elements of the form itself and submit nineteen exhibits. Specifically, the form itself, and Schedule A thereto, contain questions that are designed to elicit general information about the types of activities in which the applicant proposes to engage and the identity of the applicant's direct and indirect owners and other control persons, as well as all affiliates engaged in the clearing agency activity. Exhibits A through R request specific information related to the applicant's business organization, financial information, operational capacity and access to services.<sup>45</sup>

The SEC is providing guidance to reference the types of documents that could be submitted in preparing responses to the exhibits required by Form CA-1. For example, an EU CCP may submit to the SEC preexisting documentation or a self-assessment demonstrating that (i) the EU CCP is in compliance with EMIR and (ii) the EU CCP's compliance with EMIR also

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<sup>44</sup> 15 U.S.C. 78q-1; 17 CFR 240.17Ab2-1. Rule 17Ab2-1 directs applicants for registration as a clearing agency or applicants for an exemption from registration to apply on Form CA-1.

<sup>45</sup> As discussed further in Part III.A, Exhibit S is required for requests for an exemption from registration as a clearing agency. In addition to completing the Exhibit S, an EU CCP may also submit a petition to request an exemption from certain SEC requirements outside of the registration process. See *supra* note 40, *infra* note 55, and accompanying text.

satisfies the Exchange Act requirements for registration.<sup>46</sup> The use of existing documentation or a self-assessment could help facilitate the efficient preparation of an EU CCP's application to the SEC, as well as the SEC's efficient review of the application, potentially resulting in shorter application preparation and review periods. The use of self-assessments may help facilitate the SEC's review process by substantiating and supplementing any preexisting documentation provided in response to the Form CA-1.

Accordingly, the SEC is providing guidance to articulate methods that future EU CCPs can use to facilitate an efficient process for clearing agency registration. First, the SEC encourages future EU CCP applicants to engage with SEC staff and submit drafts of the application for SEC staff to review while an EU CCP prepares the Form CA-1 and accompanying exhibits. SEC staff can provide technical advice regarding how to answer the questions on the form itself and to prepare the required exhibits, which could help facilitate the efficient preparation of a Form CA-1 application. The SEC will also look to coordinate with the EU CCP's NCA for the purposes of analyzing and evaluating any documentation submitted by the EU CCP.<sup>47</sup>

Second, the SEC believes that much of the material requested by the Form CA-1 and its exhibits has likely been memorialized in preexisting documents that an EU CCP already provides or has provided to NCAs or other regulatory authorities in the EU. In particular, an EU CCP may use materials generated in the course of its oversight by its NCA to prepare its application on Form CA-1, so long as those materials are accurate and current in all material

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<sup>46</sup> To register a clearing agency, the SEC must find that the clearing agency meets each of the requirements in Section 17A(b)(3) of the Exchange Act. See 15 U.S.C. 78q-1(b)(3)(A)–(I).

<sup>47</sup> Any such cooperative arrangements entered as a precondition to this process could be useful for ongoing coordinated or joint supervisory matters between the SEC and the NCA.

respects.<sup>48</sup> In addition, these documents could be attached to a Form CA-1 application as responsive to particular exhibits, which can facilitate the efficient preparation of the form.

Third, future EU CCP applicants could prepare self-assessments to facilitate the efficient preparation of Form CA-1 and the SEC's review of the application to determine that the applicant meets each of the requirements set forth in Section 17A(b)(3) of the Exchange Act to register a clearing agency.<sup>49</sup> In a self-assessment, an EU CCP can describe how satisfaction of regulatory requirements under EMIR supports an SEC finding that the applicant has met the requirements for registration as a clearing agency in Section 17A(b)(3). In the SEC's view, based on its experience supervising EMIR-authorized EU CCPs registered as clearing agencies and its familiarity with the PFMI, such self-assessment could significantly facilitate the SEC's review in order to make the determinations required in the Exchange Act. As an example, a self-assessment could explain how the EU CCP's compliance with EMIR corresponds to the requirements in the Exchange Act and applicable SEC rules thereunder, such as Rule 17Ad-22 and Regulation SCI.<sup>50</sup>

## **B. Requests for Exemptions**

An EU CCP may submit a request for an exemption to the SEC in one of two ways: through the Form CA-1 application or through a separate petition to the SEC. First, an EU CCP may submit a request for an exemption from registration as part of Exhibit S to its Form CA-1 application, either when it seeks to register as a clearing agency or at any time following registration by submitting an amendment to its application including such request. Exhibit S

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<sup>48</sup> For example, an EU CCP could include any preexisting documents prepared for use by its NCA as an attachment to its Form CA-1 application and reference said attachment in response to the requested exhibit. Such an approach would be consistent with the requirements of the Form CA-1.

<sup>49</sup> See supra note 46.

<sup>50</sup> See supra notes 12–15 (describing the requirements in Rule 17Ad-22 applicable to CCPs), 18 (citing to the requirements of Regulation SCI), and accompanying text.

requires an applicant to provide a statement demonstrating why the approval of the requested exemption would be consistent with the public interest, the protection of investors, and the purposes of Section 17A of the Exchange Act.<sup>51</sup>

Second, for other exemption requests, an EU CCP may submit a petition to the SEC requesting exemptions from certain SEC requirements for clearing agencies under the Exchange Act pursuant to the SEC's authority in Section 17A(b)(1) or Section 36 of the Exchange Act, as applicable. For example, an EU CCP may request an exemption because it has determined that the application of certain SEC requirements would impose unnecessary, duplicative, or inconsistent requirements in light of EMIR requirements to which the EU CCP is already subject. As outlined above, the SEC previously has made determinations related to such issues.<sup>52</sup>

As discussed in the CCA Standards adopting release, whether the SEC approves an exemption is dependent on several factors, many of which were identified as relevant to a potential request for an exemption by an EU CCP.<sup>53</sup> Based on the SEC's supervision of EU CCPs to date, and to provide certainty to EU CCPs that request exemptions, the SEC believes it is appropriate to make clear that it will consider the following factors – as applicable to a particular request – in assessing whether to grant an exemption to an EU CCP: (i) the nature of the EU CCP's activities as a clearing agency; (ii) the anticipated level or volume of activity that the applicant seeks to effect within the United States; (iii) the structure of, scope of, and requirements under EMIR to which the applicant is subject in its home jurisdiction; (iv) the extent to which the application of EMIR is relevant to the findings the SEC must make in considering an exemption under Section 17A(b)(1) of the Exchange Act; and (v) the extent to

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<sup>51</sup> See supra note 6 (noting exemptions from registration as a clearing agency provided to Clearstream and Euroclear Bank).

<sup>52</sup> See supra notes 40–42 and accompanying text; infra notes 55–57 and accompanying text.

<sup>53</sup> CCA Standards adopting release, supra note 14, at 70791.

which the SEC and the relevant EU authority or authorities have appropriate cooperative arrangements in place to communicate and cooperate to fulfill their respective regulatory mandates. In addition, as noted in the CCA Standards adopting release, the Commission will also consider the extent to which the EU CCP is subject to appropriate supervision and enforcement by the NCA or other relevant authorities in the context of comparable EMIR requirements.<sup>54</sup>

As discussed in Part II.C.2, LCH SA petitioned the SEC to request exemptions under the Exchange Act from the application of Rule 17a-22 and Rules 17Ad-22(c)(2) and (c)(2)(iii), and the SEC approved this request based on factors similar to those discussed above.<sup>55</sup> The SEC has also provided exemptions to LCH SA with respect to application of Section 19(b) of the Exchange Act and Rule 19b-4 thereunder,<sup>56</sup> and to LCH SA and ICEEU with respect to the application of Sections 5 and 6 of the Exchange Act.<sup>57</sup>

#### **IV. Conclusion**

The SEC has structured its regulatory framework for clearing agencies that are EU CCPs to achieve an appropriate balance between (i) applying the levels of oversight and supervision for clearing agencies that ensure consistency with the Exchange Act and, at the same time, (ii) avoiding the application of certain SEC requirements that are unnecessary, duplicative, or inconsistent relative to EMIR requirements that have already been applied to the EU CCP in the EU. Accordingly, this policy statement and guidance is designed to provide transparency into the SEC's processes and to describe the processes available to EU CCPs that seek to register as

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<sup>54</sup> See id. (discussing as a relevant factor the particular system of supervision and oversight in a non-U.S. jurisdiction for purposes of evaluating any non-U.S. framework).

<sup>55</sup> See supra note 40 and accompanying text.

<sup>56</sup> See supra note 41 and accompanying text.

<sup>57</sup> See supra note 42 and accompanying text.

clearing agencies or request exemptions from certain SEC requirements. This policy statement and guidance also highlight efficient ways that EU CCPs can comply with SEC rules and describe how an EU CCP can facilitate the efficient preparation of its application and the SEC's review of such application, potentially resulting in shorter application preparation and review periods. It also identifies the factors that the SEC will consider with respect to future requests for exemptions, as applicable to a particular request. The SEC looks forward to continuing its dialogue with the EC regarding its consideration of whether to find the SEC's regulatory framework for CCPs equivalent to EMIR.

By the Commission.

Dated: November 23, 2020.

**Vanessa A. Countryman,**

*Secretary.*

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